IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 8, 2006

MICHAEL J. NUNLEY v. STATE OF TENNESSEE

Appeal from the Circuit Court for Grundy County
No. 5773 Thomas W. Graham, Judge

No. M2005-02257-CCA-R3-PC - Filed December 29, 2006

The petitioner, Michael J. Nunley, appeals from the Grundy County Circuit Court's denial of his petition for post-conviction relief, by which he had challenged his convictions of second degree murder and aggravated robbery. We affirm the post-conviction court's order.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and J.C. MCLIN, JJ., joined.

Paul D. Cross, Monteagle, Tennessee, for the Appellant, Michael J. Nunley.

Robert E. Cross, Jr., Attorney General & Reporter; Jennifer L. Bledsoe, Assistant Attorney General; James Michael Taylor, District Attorney General; and Steven H. Strain, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The petitioner is serving an effective 25-year sentence for convictions of second degree murder and aggravated robbery. His post-conviction petition alleged the ineffective assistance of trial counsel. The post-conviction court conducted an evidentiary hearing, after which it denied relief. On appeal, the petitioner claims that he should have been availed a new trial on the ground that his trial counsel was ineffective for not utilizing expert testimony as a means of advancing a theory of self-defense.

This court's opinion on direct appeal provides an evidentiary overview of the petitioner's case:

> On June 24, 1992, Randall Eugene Arp traveled to Grundy County, Tennessee, presumably for the purpose of purchasing marijuana. At some point in the afternoon, Arp met with the

[petitioner's] half-brother, Phillip Nunley, at the VFW Club near Monteagle, Tennessee. Later in the day, the [petitioner] met with Phillip Nunley at the VFW. Phillip Nunley asked the [petitioner] to come with him to a place known as "The Chimneys," where Phillip Nunley had agreed to meet Arp.

Sometime after 7:00 p.m., the two brothers arrived at "The Chimneys." Arp was sitting in his car waiting for them. According to the [petitioner's] testimony at trial, shortly after the [petitioner's] arrival, Arp leaned over towards the floorboard of his car, and when he came up he "laid his hands on the steering wheel" displaying a pistol. The [petitioner] testified that upon seeing the pistol, he fired a nine-millimeter pistol at Arp. According to his own testimony, the [petitioner] shot twice through Arp's windshield, severely wounding him. He then walked up to the passenger side door and shot Arp three more times.

At the crime scene, police found a fully loaded .22 caliber automatic pistol in the weeds around the passenger side of the car, a shaving kit on the ground outside the car, and a calculator on the roof of the car. The pistol, which had not been fired, was identified as belonging to the victim, Arp. Fingerprints and palm prints were taken from the hood of the car which matched the finger and palm prints of the [petitioner's] half-brother.

After shooting Arp, the [petitioner] took money and a watch from the deceased and eventually went to his mother's house, where he gave the gun and money to his sister. The next morning, the police arrested the [petitioner] at his mother's house. The [petitioner's] mother showed them a suitcase which contained the gun and the stolen money. The watch belonging to Arp was found in the back seat area of the patrol car that transported the [petitioner] to the Grundy County jail. After being taken to jail, the [petitioner] confessed to killing Arp, but claimed it was in self-defense.

Testimony of the medical examiner who performed Arp's autopsy established that Arp had been shot five times, three times in the chest and abdomen and twice in the head. One of the shots that hit Arp in the chest had been fired at a range of less than twenty-four inches. One of the shots entered at the posterior of the head and exited through the cheek. Any of the shots could have been fatal. A ballistics expert testified that all of the shots were fired from the [petitioner's] nine-millimeter handgun.

State v. Michael Nunley, No. 01C01-9309-CC-00316, slip op. at 2-4 (Tenn. Crim. App., Nashville, Feb. 2, 1995). On direct appeal, this court adjudicated issues of sufficiency of the convicting evidence and sentencing issues. *See generally id.* We affirmed the petitioner's convictions. *See id.*, slip op. at 16.

In the post-conviction evidentiary hearing, the petitioner presented the testimony of Dr. Norman West, a clinical psychologist, who testified that he was licensed and trained to diagnose and treat mental disorders and that he was experienced in treating patients suffering from post-traumatic stress disorder (PTSD). He testified that he had interviewed the petitioner and had reviewed the petitioner's extensive medical records. The records revealed that the petitioner experienced third degree burns in 1978 when his vehicle was "rear ended" and the gas tank exploded. This event prompted PTSD, which afflicted the petitioner at the time of the 1992 conviction offenses. At that time, the petitioner also suffered from alcohol and prescription-medication addiction, memory impairment, and an anxiety disorder. Three days before the homicide of which the petitioner stands convicted, he was released from a hospital with a skin graft, only to have it "come loose." Doctor West testified that, in addition to PTSD and alcoholism, the petitioner suffered from depression in the 1990's, and he opined that these three recognized disorders have an interactive effect. The person suffering with PTSD will over-react and be "hyper-vigilant," evincing a "hyper arousal syndrome." Such persons also have a "heightened startle response," and they often misinterpret "environmental cues . . . , hearing or seeing one thing, but interpreting it another way." Doctor West opined that the depression slows the "overall thinking process" and that alcoholism causes "an altered state of consciousness," leading to a less-than-accurate interpretation of the environment. The alcoholism resulted in an enlarged liver, elevated liver enzymes, brain atrophy, and "alcohol induced psychotic disorder with hallucinations." The doctor testified that the petitioner drank up to a gallon of whiskey a day and for 14 or 15 years was in a "state of perpetual intoxication." The heavy drinking began within two years of the petitioner's motor vehicle accident. Doctor West also opined that, beginning in the 1980's, the petitioner experience dementia, a permanent form of memory loss.

Doctor West testified that the various disorders the petitioner experienced in 1992 "would significantly impair a person's reasoning ability and their insight and their judgment." Such impairment would affect the person's ability to waive his right to remain silent and to refrain from incriminating himself to law enforcement officers. Doctor West said, "I wouldn't have deemed [the petitioner] competent to make those kinds of decisions at that point in time." The doctor opined that the petitioner likely had problems in communicating with his attorney.

Doctor West testified that the nature and effects of the various disorders he described were known in 1992 and 1993 and that a person with his qualifications on the subjects would have been available to testify at the petitioner's trial.

On cross-examination, Dr. West admitted that in his trial testimony the defendant recounted in detail the homicide. Dr. West agreed that he could not be absolutely certain that the defendant's memory of the events surrounding the homicide was impaired and that, during his

interview of the defendant, the defendant was able to answer questions and be articulate. The defendant never expressed to Dr. West that he experienced any difficulty in communicating with his trial attorney. Doctor West agreed that the defendant essentially related the same account of the homicide in his pretrial statement as he did in his trial testimony.

The petitioner called his trial counsel, an assistant public defender with 30 years' experience, to testify in the evidentiary hearing. Counsel testified that the petitioner was originally charged with first degree murder. At the time of counsel's appointment to the case, the petitioner had been receiving skin grafts and wore a brace on one leg. "[H]e just didn't appear to be in real good health," counsel testified.

Counsel recalled that the petitioner, in his pretrial statement, admitted taking from the victim's wrist the watch found in the patrol car that transported the petitioner. He recalled that the petitioner later disavowed any memory of the watch's origin. Counsel agreed that the petitioner's pretrial statement also explained why the petitioner and his brother were going to meet the victim, whereas later the petitioner stated he was unsure of the reason for the meeting. Counsel did not recall discussing with the petitioner whether his lapses in memory could be the function of a mental disorder. Counsel testified, "[H]e seemed to have a pretty good grasp of what was going on and seemed to have a pretty good memory of what had happened . . . ." Counsel indicated that he would have filed a motion for a mental examination had the petitioner evinced any basis for doing so.

Counsel testified that he defended the petitioner's case via a theory of self-defense. Counsel recalled that the victim and the petitioner were unacquainted prior to their fateful meeting. The defense theorized that the victim met the petitioner's brother to buy marijuana and that upon seeing the petitioner – someone that he did not know, the victim pulled his gun, and the petitioner reacted by shooting the victim.

On cross-examination, counsel testified that he did not recall whether the petitioner exhibited any difficulty in communicating with counsel. Generally, he thought the petitioner was communicative. Counsel never noticed that the petitioner was having memory problems.

Counsel testified that their choice of self-defense as a strategy was significantly guided by proof that the petitioner shot the victim, including the discovery at the murder scene and in the victim's car of shells that had been ejected from the petitioner's handgun. Also, property stolen from the victim had been traced to the petitioner. Counsel opined that the jury justifiably could have convicted the petitioner of first degree felony murder.

The post-conviction judge rendered his findings from the bench following the hearing. He found that the "testimony of the doctor was not compelling" and that, at any rate, counsel did not deficiently perform, based upon "what they viewed at the time." Counsel was assisted by a "cooperative defendant who was . . . sober and able to discuss the events." Furthermore, the court opined that, in any event, testimony akin to that of Dr. West would not have changed the result at trial. Based upon these findings, the court denied relief.

Now on appeal, the petitioner challenges his trial counsel's failure to pursue expert testimony akin to that of Dr. West. He does not condemn the choice of a self-defense strategy but, rather, claims that the use of such expert testimony would have enhanced his self-defense claim.

In post-conviction proceedings, the petitioner has the burden of proving by clear and convincing evidence the claims raised. T.C.A. § 40-30-110(f) (2003). On appeal, the lower court's findings of fact are reviewed de novo with a presumption of correctness that may only be overcome if the evidence preponderates against those findings. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). "Claims of ineffective assistance of counsel are considered mixed questions of law and fact and are subject to de novo review." *Serrano v. State*, 133 S.W.3d 599, 603 (Tenn. 2004); *see State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999).

When a petitioner challenges the effective assistance of counsel, he has the burden of establishing (1) deficient representation and (2) prejudice resulting from that deficiency. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Deficient representation occurs when counsel's services fall below the range of competence demanded of attorneys in criminal cases. *Bankston v. State*, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991). Prejudice is the reasonable likelihood that, but for deficient representation, the outcome of the proceedings would have been different. *Overton v. State*, 874 S.W.2d 6, 11 (Tenn. 1994). Courts need not address both *Strickland* components in any particular order or even address both if the petitioner fails to meet his burden with respect to one. *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). On review, there is a strong presumption of satisfactory representation. *Barr v. State*, 910 S.W.2d 462, 464 (Tenn. Crim. App. 1995).

In evaluating counsel's performance, this court should not examine every allegedly deficient act or omission in isolation, but rather we view the performance in the context of the case as a whole. *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The primary concern of the court should be the fundamental fairness of the proceeding being challenged. *Id.* Therefore, this court should not second-guess tactical and strategic decisions of defense counsel. *Henley*, 960 S.W.2d at 579. Instead, this court must reconstruct the circumstances of counsel's challenged conduct and evaluate the conduct from counsel's perspective at the time. *Id.*; *see also Irick v. State*, 973 S.W.2d 643, 652 (Tenn. Crim. App. 1998).

In the present case, we begin with the post-conviction court's finding that counsel had no basis for discerning that psychological evidence would be useful. The court found that the petitioner was a competent, cooperative, and communicative client who neither exhibited any signs of mental impairment nor told counsel of any mental frailties. "[I]t is . . . well-established that 'the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.'" *Henley*, 960 S.W.2d at 583 (quoting *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066). Perhaps, the self-defense theory could have been augmented by evidence of the type offered by Dr. West in the post-conviction hearing, as well as by other evidence of which we are yet unaware, but the post-conviction court was unwilling to conclude that counsel, who was trying the

case twelve years before Dr. West's post-conviction testimony, was deficient in not having conjured similar evidence. We are likewise unwilling to so hold.

Additionally, we are unconvinced that evidence of the type offered by Dr. West at the post-conviction hearing would have been admissible at trial. As we comprehend the thrust of Dr. West's testimony, the petitioner's PTSD and associated problems could have affected not only the petitioners' ability to waive his right to talk to police officers but also his ability to accurately discern the imminence and scope of any threat posed by the victim. The petitioner argues on appeal that Dr. West's testimony would have enhanced his chances of exoneration through a theory of self-defense. To be sure, our courts have recognized the evidentiary value in "psychiatric evidence that the defendant lacks the capacity, because of mental disease or defect, to form the requisite culpable mental state to commit the offense charged is admissible under Tennessee law." *State v. Hall*, 958 S.W.2d 679, 689 (Tenn. 1997). Although the petitioner is not claiming that he lacked the capacity to form the mens rea required for first or second degree murder, he would lever himself into the privilege of self-defense based upon an aggregation of mental disorders. Even if his theory is legally tenable, we believe the evidentiary standards imposed by cases such as *Hall* apply and that the evidence offered does not meet those standards.

Specifically, our supreme court in *Hall* rejected the expert testimony, in part, because the expert "spoke only abstractly and generally about typical persons with personality types similar to Hall's type," rather than referring to "the capacity of the particular defendant on trial." *Id.* at 691. Although Dr. West testified in the post-conviction hearing that the petitioner suffered from various mental disorders, the result of which generally cause "hyper-vigilan[ce]," "hyper arousal," "heightened startle response," and impairment of an ability to accurately interpret "environmental cues," Dr. West spoke of the impairment of "*a person's* reasoning ability and *their* insight and *their* judgment." (Emphasis added.) More importantly, Dr. West did not address the "environment cues" preceding the petitioner's shooting of the victim and did not explain whether or how the petitioner's disabilities caused an inappropriate response. Thus, even if Dr. West's testimony could be viewed as addressing a viable component of self-defense in Tennessee,[1] we believe that his testimony would have been nevertheless inadmissible at trial, and consequently, the petitioner was not prejudiced because trial counsel failed to call him or a similar witness to testify.

In passing, we note that the gravamen of the petitioner's trial defense and his challenge to the sufficiency of the evidence on appeal was that the facts demonstrated an *appropriate* lethal response to the victim's aggression. Thus, the claim that Dr. West should have been called as a trial witness conflicts with the strategy chosen by trial counsel. We acknowledge that counsel may have chosen a trial strategy in ignorance of the type of evidence that an expert such as Dr. West could have offered, but we also recognize that the petitioner's trial occurred in 1993, before this

[1] Tennessee Code Annotated section 39-11-611 governs justification of lethal force through defense of self when the person "*reasonably* believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force." T. C.A. § 39-11-611(a) (2003) (emphasis added). "The person must have a *reasonable* belief that there is an imminent danger of death or serious bodily injury." *Id.*

court decided *State v. Phipps*, 883 S.W.2d 138 (Tenn. Crim. App.1994), which clarified the evidentiary law regarding an accused's lack of capacity to form the mens rea required for a charged offense. *See generally id*. Given the legal circumstance at the time, we believe that trial counsel made informed decisions of trial strategy. *See Robert Williams v. State*, No. E1999-00323-CCA-R3-CD, slip op. at 5 (Tenn. Crim. App., Knoxville, Jan. 6, 2000) ("The petitioner's trial was prior to the *Phipps* decision; the state of the law with regard to admissibility of expert testimony regarding diminished capacity was in a confusing state of evolution prior to *Phipps*.").

Because the record supports the post-conviction court's finding that counsel was not deficient, we affirm the denial of post-conviction relief.

_____

JAMES CURWOOD WITT, JR., JUDGE